Korellis Roofing, Inc. *and* Charles E. Dixon. Case 13–CA–40945

January 27, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On October 28, 2003, Administrative Law Judge William N. Cates issued the attached bench decision. The General Counsel filed an exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the General Counsel's exception and, there having been no other exceptions filed, has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Korellis Roofing, Inc., Hammond, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Make Charles E. Dixon whole for any loss of earnings and other benefits resulting from his discharge, in the manner set forth in the remedy section of this decision."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., January 27, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] In accordance with the General Counsel's exception, we shall modify the judge's recommended Order to include a backpay provision, which the judge inadvertently omitted. We shall also substitute a new notice to conform to the Order.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you because we believe you filed grievances and assisted the United Union of Roofers, Waterproofers and Allied Workers, Local Union No. 26 and to discourage you from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Charles E. Dixon full reinstatement to his former job, or if his former job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.

WE WILL make Charles E. Dixon whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Charles E. Dixon, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any manner.

KORELLIS ROOFING, INC.

HyeYoung Banc-Thompson, Esq., for the Government.[1]
Stephen M. Maish, Esq. for the Company.[2]
Charles E. Dixon, Pro Se.[3]

[1] I shall refer to Counsel for General Counsel as the Government
[2] I shall refer to Respondent as the Company.
[3] I shall refer to Charging Party as Dixon or Charging Party Dixon.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case. At the close of a 2-day trial in Chicago, Illinois on September 24, 2003, and after hearing closing argument by Government and Company counsel, I issued a Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (the Board) Rules and Regulations setting forth findings of fact and conclusions of law.

For the reasons, specifically including credibility determinations, stated by me on the record at the close of trial, I found the Company violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by on or about November 11, 2002, discharging its employee Charging Party Dixon because the Company believed he filed a grievance and assisted the United Union of Roofers, Waterproofers and Allied Workers, Local Union No. 26. I rejected, as post hoc rational-izations, the various asserted justifications by the Company, such as it was downsizing and moonlighting activity by Charging Party Dixon. I concluded the Company failed to meet its burden of establishing it would have discharged Dixon even in the absence of any protected conduct on his part.

I certify the accuracy of the portion of the transcript, as corrected,[4] pages 388 to 424 containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as Appendix B.

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2) (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Company having discriminatorily discharged its employee Charles E. Dixon, I recommend he, within 14 days from the date of the Board's Order, be offered full reinstatement to his former job, or if his former job no longer exists to a substantially equivalent position, without prejudice to his seniority, or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him with interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[4] I have corrected the transcript pages containing my Bench Decision and the corrections are as reflected in attachment Appendix C (unpublished.)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Company, Korellis Roofing, Inc., Hammond, Indiana, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging employees because they believe employees have filed grievances or assisted the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order offer Charles E. Dixon reinstatement to his former position or if his former position no longer exists to a substantially equivalent position without prejudice to his seniority or other rights or privileges.

(b) Within 14 days of the Board's Order remove from its files any reference to Dixon's unlawful discharge and within 3 days thereafter notify him in writing this has been done and that his discharge will not be used against him in any manner.

(c) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, Social Security payment records, time cards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of any back pay due under the terms of this Order.

(d) Within 14 days after service by the Regional Director of Region 13 of the National Labor Relations Board, post at its Hammond, Indiana, facility copies of the attached notice marked "Appendix B".[6] Copies of the Notice, on forms provided by the Regional Director for Region 13 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to Employees, to all employees employed by the Company on or at any time since November 11, 2002.

Within 21 days after service by the Region, file with the Regional Director for Region 13 of the National Labor Relations

[5] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Board sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated at Washington, D.C. October 28, 2003

APPENDIX A

NOTICE TO EMPLOYEES
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An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge our employees because we believe they filed grievances and assisted the United Union of Roofers, Waterproofers and Allied Workers, Local Union No 26 and to discourage employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Charles E. Dixon full reinstatement to his former job or if his former job no longer exists to a substantially equivalent position without prejudice to his seniority or other rights or privileges previously enjoyed; and, WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharge of Charles E. Dixon, and WE WILL notify him in writing that his discharge will not be used against him in any manner.

KORELLIS ROOFING, INC.

APPENDIX B
Transcript Pages 388–424

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JUDGE CATES: This is my decision. The issue presented in this case is whether the Respondent's discharge of employee Charles E. Dixon is in violation of Section 8(a)(1) and (3) of the National Labor Relations Act. And on the

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entire record, including my observation of the demeanor of the witnesses and after considering the parties helpful closing arguments, I make the following.

The company is an Indiana corporation with an office in place of business in Hammond, Indiana. The company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2) and (6) and (7) of the Act. The parties admit and I find that the United Union of Roofers, Waterproofers and Allied Workers Local Union No. 26 is and has been at all material times here in a labor organization within the meaning of Section 2(5) of the Act.

The Government contends that Mr. Dixon was discharged specifically because the company believed that he had filed a grievance and assisted the Union and engaged in concerted activities and that the company took the action it did in order to discourage employees from engaging in these type of activities. The company, on the other hand, contends that it had nothing to do with his Union activities or lack thereof. That the company has been on a program for some time of downsizing their operation because of the sluggish economy and that there were a number of factors that brought about the termination of Dixon and that the last straw or the straw that broke the camel's back was his performing an unauthorized side job. And that was the point that brought to a head the decision to terminate Dixon.

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Dixon is a seven year employee of the company and he was fired on November 11, 2002. And about that fact there is no dispute. For the last three or four years of his employment, Dixon worked as a technician in the Service Department under the supervision of Foreman Bruce Bailey. The company installs or builds various types of roofs, such as rubber, shingle, tile, gravel, heat welding and various other types of roofing. While some of the co-workers of the company may only be able to perform work on a limited number of roof types, the Service Department employees are expected to know how to service and/or repair any or all of the types of roofs that are installed by the company.

The Service Department employees work year around in all types of weather conditions and on all types of roofs in need of repair. The company, which was established in 1960 by Union roofer, George Korellis, has from its inception been a unionized company with its employees covered by a collective bargaining agreement negotiated with the Union by the Northwest Indiana Roofing Contractors Association an employer trade representative group.

The party's most recent association negotiated collective bargaining agreement is effective from June 1, 2000 until May 31, 2004. Dixon has been a member of the Union for 19 years but has never held an official position with the Union.

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On or about July, August or perhaps September 2002, Dixon was nominated along with five other individuals to become a second business agent organizer for the Union. The selection for that second business agent organizer position has yet to be filled. During the same general time period and perhaps for an extended time prior thereto, Jeff Lussow was the Union Shop Steward at the company. However, he was appointed in approximately mid 2002 to fill in for a Union business representative that had suffered a stroke and was there after elected as the Union's business representative.

When Lussow became the business representative for the Union, he resigned his position with the company and no longer

served as the Union Shop Steward for the represented employees at the company. Business Representative Lussow testified that while Dixon was never formally elected as shop steward to replace Lussow, the employees looked at Dixon as their Union Shop Steward. Dixon testified employees brought their job related concerns to him.

Former employees Glenn Elkins and Jeffery Vaux testified that after Business Representative Lussow left the company, they and every one else of the employees at the company assumed Dixon was the shop steward for the employees.

In the summer of 2002 the company had, among other

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jobs, two major roofing projects. One at the Harrison School project and the other at the Valparaiso University project. Lots of roofers were needed so Dixon, among others, was assigned to work on one of these projects. At the time the projects were getting underway, the students were returning for classes in those particular schools. And the parties contracting for the roofing service asked the company not to fire up their hot tar kettles until after the students had completed their class attendance for the day. This was not feasible, however, and the company with agreement with the university and the school did not fire up their hot tar kettles until approximately 2:00 p.m. in the afternoons.

As a result of this later time, the employees had a late start time for their work day, which commenced around 10:00 to 11:00 a.m. and then worked until 6:00 to 7:00 p.m. in the evening. The parties collective bargaining agreement states the work day shall be from 8:00 a.m. to noon and from 12:30 p.m. until 4:30 p.m. five consecutive days per week with the work week starting at 8:00 a.m. on each Monday and ending at 4:30 p.m. on the following Friday.

All work was to be performed within the regular week with overtime being paid at one and-a-half times the regular hourly rate. The employees could start earlier

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than 8:00 a.m. in the hot summer months to avoid uncomfortable conditions without a penalty to the contractor. However, the one and-a-half times regular hourly rate was to be paid for work performed after eight hours for any one working day as directed in the collective bargaining agreement.

Dixon testified various employees complained to him about the late start time without them being paid overtime after 4:30 p.m. Dixon discussed the concerns of certain of the employees and mentioned it to Business Representative Lussow. On August the 23rd, 2002, Union Business Representative Lussow wrote company president, Pete Korellis, that the Union had been notified that the company was working bargaining unit employees, "unusual," hours and if that was the case, the Union would file a grievance.

A grievance was, in fact, filed on September 3, 2002 and referred on that date to the Joint Adjustment Board for the scheduling of a hearing. The grievance was heard by the Joint Adjustment Board on September 16, 2002 with a decision that was adverse to the company. Then a letter was sentdated October 4, 2002, addressed to the Northwest Indiana Roofing Contractor's Association and the Union, in which the company's attorney asserted certain irregularities in the Joint Adjustment Board's action.

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The Joint Adjustment Board, without conceding any errors, agreed to hold a second hearing on the same grievance. And that hearing was held on October 28th, 2002 again with a finding against the company. The company was ordered to, by November 15th, 2002, pay time and-one-half to those company employees that worked on the Harrison School project and the Valparaiso University project after 4:00 p.m. daily.

Dixon testified that about one to two weeks before the original grievance was filed on September 3, 2002, he met with company president Korellis to see if the late start overtime matter could be resolved gentleman to gentleman without a grievance. Dixon testified company president Korellis did not think the collective bargaining agreement clearly and explicitly required the overtime payment and the employees simply wanted to be paid.

Dixon testified nothing was resolved in his meeting with company president Korellis. Dixon testified that approximately two weeks before he was fired, former company owner, George Korellis, spoke with him at the office in the presence of Rich Perez. According to Dixon, George Korellis was upset about the late start time situation and told Dixon that he, Dixon, was the Union's Shop Steward and that this would never have taken place if he had not filed the grievance.

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On or about November 9, 2002, Dixon helped fellow employee Chuck Livingston do an un-bid roofing job for the mother of one of Livingston's friend. The collective bargaining agreement addresses the issue of any employee, "moonlighting," in such a manner and provides that either the company or the Union may file a grievance against any such moonlighting work by any individual employee.

Company President Korellis stopped by the project and spoke with Livingston and although Dixon was on the back side of the home, his truck was parked in full view. As soon as company President Korellis left where the moonlighting work was taking place, Dixon also left the work sight. Dixon telephoned Union Business Representative Lussow. Lussow stated company President Korellis had already telephoned him about the situation.

Lussow testified company President Korellis telephone him on November 9, 2002 and left a message on his telephone that said, Jeff, this is Pete. Dixon and Livingstone are doing a job on the side. There is the grievance on the start time and his running for the second BA position. Ponder it and give me a call back.

Union Business Representative Lussow saved the message for a period of time but testified it was thereafter purged from his phone. Dixon testified he learned from his

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supervisor, Bailey, that he was to meet with company President Korellis on Monday morning, November 11, 2002. Dixon

testified he met with President Korellis and Korellis told him he was going to let him go, that they needed to get away from each other and that the company was downsizing.

Dixon testified he was shocked and although he could not remember everything that he said, he did use some profanity and may have even used the "f" word. Dixon testified he telephoned company President Korellis that afternoon, November 11th, 2002, and apologized for his language and asked for a better explanation as to why he was fired.

Dixon testified he met with company President Korellis on Friday, November the 15th, 2002, at Korellis's office. Dixon said he turned in some t-shirts he had that belonged to the company along with the company's telephone and the company provided him his last paycheck. Dixon testified as he was about to leave Korellis's office, Korellis asked that he wait a minute and acknowledged he owed Dixon a better explanation for his termination.

According to Dixon, Korellis told him that he fired him because he was too vocal on Union issues, that he gave his supervisor Bailey a hard time, that he made the company's safety coordinator look bad at safety meetings and that the

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Service Department's secretary, Sherry, did not like him.

Dixon protested that if he was such a bad employee, why had the company not talked to him about his shortcomings.

On Saturday, November 15 or 16, whichever day Saturday was, 2002, Dixon testified that he and company President Korellis met at the International House of Pancakes in Hammond, Indiana. Korellis told Dixon he had spoken with his father and other management members and they were going to give Dixon another chance as a roofer at the company at the American Business Center Project under the supervision of Supervisor Bishop the following Monday morning, November 17, 2002. Dixon testified he told Korellis he needed to speak with his wife about the offer and if he accepted the offer, he would be at the project site on Monday morning in time to commence work. But if he was not going to accept the offer, he would call company President Korellis on Monday afternoon. Dixon testified he declined the job because it would have meant the loss—Dixon explained he received lots more hours of work as a service department employee than he would have as just a roofer. Dixon testified he had never been disciplined or warned about his job performance or attendance.

Union Business Representative Lussow testified that when Dixon worked on his, Lussow's crew, Dixon was an

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excellent employee with no problems. Lussow testified that any employee that made it to the service crew was the best of the work force.

Lussow testified that former owner George Korellis had an office at the company and came to work every day. Lussow testified that George Korellis attends company safety meetings. Dixon testified George Korellis attended meetings with customers and visited various work sites.

Former employee Glenn Elkins testified he attended a safety meeting of the company in April, 2003. Elkins testified that all the employees wanted to start work earlier in the morning than they were starting. According to Elkins company president, Pete Korellis, stated he didn't want another grievance filed, that the company would go by the collective bargaining agreement on starting times. Elkins testified former owner, George Korellis, stated it didn't matter any more, that the trouble maker is no longer here. Elkins believed George Korellis was talking about Dixon.

Former employee, Jeffrey Vaux testified about the April, 2003 safety meeting. He said start times were discussed and that company president Pete Korellis wanted the employees to agree by vote so that another grievance could not be filed. Vaux stated company president Korellis did not want the problem to come up again. Vaux testified

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George Korellis stated the employees should not have a problem voting on the start time because they got rid of the trouble maker. Vaux testified, everyone laughed. Vaux said, George Korellis could not have been referring to anyone other than Dixon.

The company presented six witnesses in its defense. The company asserts Dixon's discharge of November 11, 2002 did not violate the Act in any manner. As I indicated earlier, the company contends it is and has been in the downsizing mode due to the state of the economy.

Company president Pete Korellis testified he drew up a tentative plan for downsizing on July 19, 2002 in which he indicated that certain employees would be considered for possible lay-off. Included in that July 19, 2002 potential list for lay-off was employee Dixon. Company president Korellis also listed possible equipment sales in his July 19, 2002 outline for possible downsizing. Company president Korellis stated Dixon was terminated for a variety of reasons related to attendance, work performance, inability to get along with co-workers and other related items, but that none of the reasons for his discharge related to any Union activities or lack, thereof, on the part of Dixon or any grievance filing by Dixon.

Company vice president of operation, Jeffrey Tharp has been with the company for 17 years with 12 of those years

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as superintendent for the company and the last four or so years as vice president of operations. Tharp had occasion to observe Dixon's work performance and sized Dixon up as being loud, obnoxious and not wanting to follow orders.

Tharp explained that in 1998 he was trying to tell Dixon on the telephone how the architectural project manager wanted the roofing job on the specific project done in a very specific manner. Tharp stated that Dixon didn't want to perform in the manner he was asked to and not realizing that his telephone was still on stated of Tharp, that he didn't have to listen to that fat fucker Tharp. Tharp spoke with company president Peter Korellis about the situation and told Korellis the company didn't need someone like that working for them. Tharp stated Dixon was transferred to the service department in 1998 but was still more of a problem that he was worth and that he told company president Korellis they didn't need to keep Dixon.

Tharp testified Dixon did not get along well with the other workers in the service department. Tharp testified company president Korellis telephoned him on November 9, 2002 and told him he had just caught Dixon moon-lighting on a side job and that Dixon had done enough. Tharp told Korellis it was fine with him to fire Dixon. Tharp said that was the final straw with respect to Dixon, along with

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his lack of respect for his co-workers and his attendance and work performance problems.

Service department administrator Sharon Osborne testified she interacted with Dixon on a daily basis and he was loud, obnoxious and a know-it-all. Osborne stated Dixon thought he knew everything and that no one else knew anything. Osborne testified she had heard Dixon use profanity on November 11, 2002, the day he was discharged.

Service department ten year employee James A. Booker testified he worked many jobs with Dixon in the service department and that Dixon was a very good roofer, but that he belittled people and wanted everything done his way. Booker said Dixon carried his weight as far as the work was concerned but he would gripe and say, that he didn't need this shit, he could get a job anywhere. Booker said Dixon's use of profanity was about on average with what the other roofing employees used. Booker testified Dixon used a lot of profanity on November 11, 2002 when he was discharged. Booker testified Dixon was saying, fuck this, fuck that, and that he didn't need this job. Booker did not hear company president Korellis use any profanity on that occasion.

Service manger Bruce Bailey was Dixon's immediate supervisor in the service department at the company. Bailey testified Dixon had an attendance problem, that

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occasionally he would be a few minutes late and on other occasions, maybe twice a month, Dixon's alarm would not go off and he would come to work late. Bailey said this happened the entire time Dixon was in the service department. Bailey stated Dixon was a very good roofer, but that Dixon was unhappy because the service representatives were not paid a foreman's wage.

Bailey stated that one worker, namely James Booker, did not like to work with Dixon. Dixon had said Booker was not a good worker. Bailey said he mentioned these matters concerning Dixon, to company president Korellis. Bailey also testified that the matter of the work start and the grievance related to the work start was discussed in safety meetings.

Company president Korellis testified he and his wife currently own the company founded by his father, George Korellis. Korellis owned the company at the time Dixon started to work for the company. Korellis testified he started receiving complaints about Dixon even before Dixon was transferred to the service department.

Korellis stated that vice president of operations, but then superintendent, Tharp complained that Dixon was a difficult employee, that he didn't follow instructions, that he talked down to his supervisor and that his fellow employees didn't like him.

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Korellis testified that after Dixon was transferred to the service department he received complaints from service manager Bailey that Dixon was difficult to deal with, that he missed more time than other employees, and that one occasion Dixon verbally attacked Bailey. Korellis said he overheard a telephone call from Dixon to Bailey complaining about, the fucking shit of the service technicians not getting foreman's pay. Korellis testified he told Dixon that such language was inappropriate and he didn't want to hear it anymore.

Korellis testified he began in July, 2002 to seriously consider down-sizing his company. Korellis said that he agreed with the statement of one of his employees that the company was getting bigger and sloppier.

Company president Korellis testified that on November 9, 2002 he received a telephone call from his father, George Korellis, that George Korellis thought he observed some of the Korellis employees doing a side job near the company's office. President Korellis drove by and observed Chuck Livingston on the ground and he thought he also saw Dixon. Korellis said he told Livingston he didn't go looking for this type thing, but when they did it right next to his office, what did he expect from them. Korellis said he thought it was hypocritical for someone that hoped to be the next BA for the Union to be out doing side jobs.

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Pete Korellis stated he telephoned Union Representative Lussow and left a message saying two guys were doing a side work next to his shop and asked what they were going to do about it. Company president Korellis testified that Union Business Representative Lussow called him back and said they would have to check in to whether the job was bid or not. Company president Korellis talked the situation over with service manager Bailey and vice president of operations Tharp. Tharp would like to see Dixon gone and Bailey said it was fine with him, that he had had it with Dixon.

Korellis said he made the decision on Saturday, November 9, 2002 to terminate Dixon, and told Dixon on Monday, November 11, 2002. Korellis met with Dixon on Monday and told him he was letting him go, that it was too much work to keep him. Korellis told Dixon he needed the company's telephone to which Dixon responded, not until he had gotten his money. Dixon then began to say, he could not believe this, and according to president Korellis started saying, fuck this, fuck that. So he asked Dixon to leave the company's property.

Korellis stated he did not use any profanity and never at any time gave as a reason for Dixon's termination that he was too vocal for the Union. Company president Korellis also testified that Dixon's discharge had nothing to do

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with the grievance that was filed related to the start times for the employees at the company. Company president Korellis testified he was in no way upset about the grievance and that he had no idea nor did he care who filed the grievance. Korellis said he welcomed the grievance because the parties needed to

get the contract language interpreted or clarified so that he would better know how to bid the jobs.

Former company owner, George Korellis, testified that he had no conversations with Dixon or in Dixon's presence where the subject matter of the grievance being filed was attributed in any manner to Dixon. Company president Korellis testified that on Wednesday, November 13, Dixon asked in a very calm manner if they could work out the situation in any manner. Dixon talked about his family and Korellis stated he did not like to be put in a position like this.

Korellis testified he met with Dixon at the International House of Pancakes on Saturday, November 16, 2002 and offered Dixon a field roofer's job with the company at the same hourly rate and the same hourly benefits. According to company president Korellis, Dixon agreed to report for work on Monday, November 18, 2002, but failed to show for work.

Company president Korellis testified his father, George

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Korellis, came to work every day and acted as a "glorified gopher" for the company. He delivers and picks up checks, obtains construction permits, goes with the residential appraiser to do appraisals and attends most company meetings.

Former company owner George Korellis testified that he maintained an office at the company and insisted that he had not retired, that he had simply slowed down considerably since selling any part of the company he owned to his son, company president Pete Korellis. Former company owner, George Korellis, said that based on his gray hair and his long experience with the company that employees as well as management and supervision sought his advice on matters related to work, and when they did, he provided it.

This case, as in most cases, requires credibility resolutions. And in arriving at my credibility resolutions I state that I carefully observed each of the witnesses as they testified and I have utilized those observations at arriving at the facts that I rely on, herein. I've also considered each witness's testimony in relation to other witness's testimony, and in light of the exhibits that have been presented in this case. If there is any evidence that might seem to contradict the credited facts that I shall set forth and rely on, I have not ignored such other evidence, but rather have discredited or rejected it as not

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reliable or trustworthy. I have considered the entire record in arriving at the facts, herein.

I shall first set forth the facts and then I will apply those facts that I find to be the facts to the applicable case law and then I will arrive at a conclusion with respect to the ultimate issue of whether Dixon's discharge violated the Act. I will only be looking at whether Mr. Dixon's discharge violated the Act. I will not be looking at any other matter.

In arriving at the credibility facts that I rely on, I start with a building block of testimony and then weave the evidence that I believe to be credible into that. The testimony that set the tone for my credibility findings in this case was given by service manager Bailey. Bailey acknowledged that there were discussions of a start time and the grievance related thereto, in the safety meetings. Having that basic framework, I am persuaded that it was an issue of considerable importance to the employees as well as management and that it was, in fact, discussed.

For example, I credit Dixon's testimony that he visited with company president Korellis approximately a week or two before the grievance was filed to see if there could be any resolution of this start time problem without any further action needing to be taken.

I am persuaded of the credibility of that for a number

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of reasons. I am fully persuaded that a number of employees complained or spoke to Dixon about the situation of having to start work later than normal on the Harrison School and the Valparaiso University projects, that the employees believed, rightly or wrongly so, that they were entitled to time and a half pay after 4:30 p.m. per the collective bargaining agreement between the parties.

I am persuaded, as testified to by at least two of the General Counsel's witnesses, that the employees viewed Dixon as the defacto job steward after the departure of the former designated job steward, Lussow. I am persuaded that Dixon discussed those matters with company president Korellis and that the two of them were unable to arrive at any resolution of it because, as Dixon testified, the employees simply wanted to be paid per the contract and company president Korellis believed that the contract was not explicit enough to warrant the employees being paid for overtime after 4:30 p.m. in the afternoons on those two work projects.

A grievance was filed, there's no question about that. And it was heard by the Joint Board. The Joint Board rendered decision number one, unfavorable to the company. And at the request of the company's attorney regarding what the company perceived as irregularities in the original hearing and decision of the Joint Board, the company's

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attorney asked for another hearing. And another hearing was granted, and again the issue was decided by a vote of six to two against the company.

With the decision coming down the second time around on or about the first of November directing that the company pay the overtime payments to the employees by November 15, It is against that backdrop that I am persuaded that this was an issue of great concern, not only to the employees who didn't like starting late and wanted to be paid when they started late, and the company that they wanted to get this matter behind them and have an interpretation or a ruling on this matter so that there wouldn't be future grievances filed against the company with respect to starting time.

I am persuaded that the issue of start time did not end with this grievance that found the company was to pay the employees for this additional time that they worked after 4:30. It appears that a number of the employees, if not a majority or all of them, wanted to start their work day even earlier than the collective bargaining agreement called for, but the company, through its president Korellis, believed that he could not do so without running a foul of the contract.

So I am persuaded that this continued to be a problem between the employees, the company and by the nature of its

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position, the Union.

I find nothing sinister about the fact that employees Chuck Livingston and Dixon were doing a moon-lighting or side job on November 9. The company had no control over that, they didn't plan that Mr. Dixon and Livingston would be down moon-lighting on a job that, according to the collective bargaining agreement, they could not be performing.

I am persuaded that former company owner George Korellis just happened to observe that these two individuals, or whom he believed, there were individuals out performing moon-lighting work. I am persuaded that he called his son, president Korellis, and said you might want to look into this.

I am persuaded that Korellis did, in fact, look into it and determine that Livingston and Dixon were performing work that constituted moon-lighting and that such was addressed in the collective bargaining agreement that employees, or for that matter even the company, would not engage in any moon-lighting work.

And I am persuaded that the company made a decision at about that time to discharge Dixon and that it did, in fact, and no one disputes that fact that he was discharged on November 11, 2002. I am persuaded that during the discharge, the initial discharge interview, that company

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president Korellis told him he was letting him go and that employee Dixon was, using his words, shocked and that he, in fact, did use profanity as a result of being told that he was discharged. I am persuaded that his profanity was vocal and loud because Dixon conceded that he used profanity. You have company president Korellis testifying that he used profanity and other employees overhearing his using profanity.

I am persuaded that Dixon dd, as he testified, called the company later and apologized for his profanity and asked that he be provided additional or better reasons for his termination. I am persuaded that Dixon and company president Korellis met and I am persuaded they met on a Wednesday. Whether they met on a Wednesday or Thursday is of no great significance as far as the outcome of this case. I am persuaded that cooler heads were prevailing at that time and that company president Korellis outlined to Dixon the reasons for his discharge.

I fully persuaded that he outlined to him that he had trouble getting along with secretary Sharon Osborne, that he had given his supervisor Bailey a hard time, that he had made the safety officer look small at a safety meeting, and that he was too vocal in his support of the Union.

The reason I conclude that, even in the face of company president Korellis' vigorous denial, is that it fits into

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the overall pattern of concern that was happening between the employees, the company and the Union. There was this irritant of the starting time, where the Union had protested even by a grievance that the company couldn't start late without paying overtime. And then the other side of the coin that a number of the employees wanted to start even earlier but could not because company president Korellis felt he could not do so because of the contract.

I am persuaded that former owner George Korellis is, as alleged in the complaint, an agent of the company for the following reasons. There is no dispute that former owner, George Korellis, still maintains an office at the company. I am persuaded that any employee observing that this individual still has an office at this facility must at least have some authority and speak with some agency status on behalf of the company.

I am persuaded that George Korellis' function with the company is not as minimal as company president Korellis would indicate that it was, that the former owner was simply a "glorified gopher". Company, former company owner George Korellis was very quick to point out that he had not retired from this facility, that he had merely slowed down considerably, that he still provided advice to the work force as well as management, that he obtained permits for the construction projects that the company performs.

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Even assuming that obtaining a permit is not that great a task; that you simply take a contract that the company has to a local governing authority and obtain a permit to do the work, employees observing or knowing of this could, in my opinion, not help but conclude that former owner George Korellis still maintained authority and a position of influence with this company, this company that he founded and previously owned.

I am persuaded that George Korellis' going with the designated appraiser to residential properties to assist in performing the appraisal and preparing a bid is functioning in a manner that anyone observing as an employee would conclude that he still had influence with this company.

I am persuaded that George Korellis' visiting the work projects, which he said he did on a daily basis, and that he tried his best to speak with each of the employees and the managers on a daily basis. And I am persuaded that his visiting with the employees and with management was more than just to say, good morning and how is your wife and family doing, because former owner Korellis points out, he has a lifetime of experience in this work and that employees and management openly and actively solicit and he provides his advice.

I am persuaded that he meets the test for determining whether an individual is an agent of the employer and that

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test is the Common Law Agency Principle Test that an individual of the employer would, under all the circumstances, be reasonably believed by employees that he reflected company policy and was speaking on behalf of company management.

Stated differently, the test is whether under all the circumstances, employees would reasonably believe that the individual in question was reflecting company policy and speaking and acting for management. I am fully persuaded that George Korellis meets those requirements and that he is an agent of the company within the meaning of Section 2(13) of the Act.

Having concluded that he is an agent, I shall now address whether he made any comments that would in any way indicate any animus on the part of the company toward Dixon and any Union or concerted activity of a protected nature that Dixon may have engaged in.

As I outlined earlier, employees Vaux and Elkins testified about an April, 2003 safety meeting in which they testified that George Korellis was present and that again, the subject of start time was a subject of the conversation in that safety meeting. Based on the testimony of Vaux and Elkins the employees were again, perhaps attempting to start work at an earlier time than was called for in the collective bargaining agreement and that the company,

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through its president Korellis, did not want to run afoul of the collective bargaining agreement again and obtain another grievance.

I'm persuaded that this came up and that company president Korellis, as testified to by Vaux, wanted some way to get around this problem that the employees, the company and the Union contract presented with respect to start time. And that president Korellis wanted them to engage in some sort of a vote and support a starting time and agree not to run a foul of the collective bargaining agreement.

I am also persuaded that George Korellis with his long years of work experience with this company and his long wisdom and knowledge of the operation of the company and of the type of work they performed, that he did not sit quietly by in these meetings, as he would indicate, and make no comments; but simply listened. I am persuaded that he indicated that the employees could vote on this matter because they had already gotten rid of the trouble maker.

I credit Vaux's testimony, as corroborated by Elkins, both Elkins and Vaux testified that they believed that former owner Korellis was making reference to Dixon. In fact, Vaux testified that everyone laughed and everyone assumed that it was Dixon that George Korellis was making reference to.

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Now having found those facts as I have outlined, I shall apply the law as I believe to be applicable in this case to those facts to ascertain if the discharge of Dixon violated the Act.

In a case called Wright Line, W-r-i-g-h-t, second word, L-i-n-e, 251-NLRB-1083, the Board set forth its causation test for cases alleging violations of the Act that turn, as does the case herein, on the employer motivation.

First, the government must persuade the Board that anti-Union sentiment was a substantial or motivating factor in the challenged employer conduct or decision. And once this is established the burden then shifts to the employer to prove its affirmative defense that it would have taken the same action even if its employees had not engaged in any protected activity.

How does the government meet that burden? Government counsel must demonstrate by preponderant evidence one, that the employee was engaged in protected activity; two, that the employer was aware of the activity; three, that the activity was a substantial or a motivating reason for the employer's action; and four, that there was a causal connection between the employer's animus and its discharge decision.

The government may meet its Wright Line burden with evidence short of direct evidence of motivation. That is,

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it may demonstrate it by inferential evidence arising from a variety of circumstances such as Union animus, timing or pretext.

Furthermore, it may be found that where an employer's proffered non-discriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. More than that, motivation of Union animus may be inferred from the record as a whole where an employer's proffered explanation is implausible or a combination of other factors circumstantially may support such an inference. Simply stated, direct evidence of Union animus is not required to support such an inference.

Has the government met its burden in this case of establishing a prima facia case? The answer, in my opinion, is yes. There is no question that Dixon, based on the credited evidence, engaged in activity that is protected by the Act. He discussed and fellow workers discussed with him whether or not the company was abiding by the party's collective bargaining agreement. The Supreme Court has held that when employees attempt to enforce a collective bargaining agreement, they are engaging in activity that is protected by the Act.

Secondly, the credited testimony indicates that Dixon visited with company president Korellis approximately one

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to two weeks before an actual grievance was filed on the start times to discuss with company president Korellis whether or not the start time issue could be resolved without any grievance being filed.

The activity just outlined indicates that Dixon engaged in activity that is protected by the Act. Was the company aware of his protected activity? And again, the answer is clearly yes. By the credited testimony, Dixon visited with president Korellis to discuss the protected conduct that he and his fellow workers had engaged in.

There is no question that a grievance was filed. And in as much as Dixon had visited with company president Korellis about the situation, it is reasonable to conclude that the company could assume that Dixon had some participation in the grievance that was actually filed.

Did the protected activity of Dixon play a substantial or motivating reason in the company's discharge of Dixon? In establishing a prima facia case before addressing the company's burdens I am fully persuaded that the government has established that it was a reason for the employer's action.

I base that on a number of factors; one of wish is that company president Korellis told Dixon that he was too vocal in support of the Union. Former company owner George Korellis told Dixon that he was the one that had filed the

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grievance. And I'm also persuaded that the timing of Dixon's discharge would indicate that it was a motivating reason for the discharge of Dixon. Was there a causal connection between the activity of Dixon, as outlined, and his discharge? I am fully persuaded there was.

Now I turn to the company's burden and address the issue of whether it met its burden of establishing that it would have discharged Dixon even in the absence of any protected conduct on this part. The company advances a number of reasons for its actions. It says that Dixon had never been a satisfactory employee, that he was loud, boisterous, obnoxious and difficult to deal with.

The company presents evidence that he belittled, ridiculed and tried to embarrass his supervisors and/or fellow workers. And that when he was observed doing moon-lighting work, that was the straw that broke the camel's back and that this long record of his attendance, his job performance, his inability to get along with co-workers, his inability to get along with management, finally had come to a head and that it was necessary, proper and not unlawful, based on the company's contention, to discharge Dixon at that point.

I reject the company's defense for at least a number of reasons. Number one, if Dixon's attendance and work performance were so egregious, why did the company tolerate

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it for a period of perhaps seven years, only to bring it to a head when the matter resolving the grievance in final form came about? If Dixon was such an egregious employee, why had he not been given warnings that were documented? If Dixon's use of profanity was a reason for terminating or a part of a reason or a culminating reason for Dixon's discharge, why was he not discharged when company president Korellis clearly said he heard him using what he considered extreme profanity to his immediate supervisor Bailey? That is, company president Korellis said, I overhead him on the telephone use this profanity. Why didn't he discharge him then if profanity was a problem?

Why did not company president Korellis, or someone on behalf of the company, follow the collective bargaining agreement and file a grievance regarding Dixon and Livingston's unauthorized moon-lighting on a project for Livingston's mother's friend? If the moon-lighting was a problem in the discharge of Dixon, why was only Dixon discharged and not Livingston also? It's clear they were both on the job, and in fact, the evidence would tend to indicate that Livingston was the one that created or brought about the project.

The only additional factor that indicates a reason for Dixon's discharge was that the company perceived, as alleged in the complaint, that he had either filed or had a

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moving position in filing the grievance and that he was too vocal in his stands on the Union.

Therefore, I find that the discharge of Dixon violated Section 8a(1) and (3) of the Act as alleged in the complaint.

The matter does not end there, however. The company, through its president Korellis, met with Dixon on or about November the 19th, the 18th or the 19th, at the International House of Pancakes in, I believe, Hammond, Indiana. The exact location is not critical to the determination of this issue; in which company president Korellis offered Dixon reemployment with the company as a field roofer at the exact same hourly wage rate and at the exact same hourly benefit rate that he would have had as a service employee.

Whether you take company president Korellis' version that Dixon said he would be there on Monday and didn't show or whether you take Dixon's version that he told him, if I'm going to take your offer I'll be there Monday morning, and if not, I won't be at the American Business Machine project. Doesn't make any difference, the offer would be the same and the rejection would be the same. The question is, does this constitute a substantially equivalent position that Mr. Dixon previously had that company president Korellis offered to him?

I look at a number of factors in arriving at a

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conclusion on that. Dixon had, in the past, been taken from his service department job and sent to a roofing job. The most recent example, at least on this record, is that Dixon was placed on the Harrison School and/or the Valparaiso University Project. I believe the evidence will show that Dixon was on the Valparaiso University Project. So it would indicate the Dixon had performed work as a field roofer.

The other side of the coin is that Dixon testified, and I don't believe it was contradicted on this record, that he did not consider it to be the same job for a number of reasons. One, that as a roofer in the field you're exposed to the elements; that is you suffer the heat in the summer and the cold in the winter. He testified that service employees received more hours of work on an annual basis than would field roofing employees for, among other reasons, weather conditions would intervene and even if there was work to be performed, it could not be performed on certain occasions.

Dixon also testified that in the summer as a service technician you got to ride in the comfort of an air-conditioned vehicle between projects and in the winter you were sheltered from the cold and the storm as you moved from job to job in the vehicle.

Does the field roofing position equal a substantially

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equivalent position as to a service department employee? One other factor must be looked at before I arrive at that answer. And that is again, I believe it is uncontradicted on this record, that service department positions were sought after by the employees.

Lussow, for example, testified that it was the cream of the crop that made it to the service department because, as employee Dixon testified, you had to be able to perform repairs on any type of roof that the company may have installed or that may be seeking repairs to. That is, the service technician would have to be familiar with and know how to do repairs on shingle, tile, tar, metal, concrete, gravel, whatever type roof there was. So that factor has to be weighed in as to whether or not it is a substantially equivalent position.

I am persuaded that it is not a substantially equivalent position primarily because of the potential for the loss of earnings that was testified to by employee Dixon, that is that the number of hours that the service employees were able to work during a 12 month period of time would exceed the hours that a field roofing employee would be able to obtain. The fact of the addition comfort and the working conditions are additional factors that weigh in whether it is a substantially equivalent position.

But the potential for earnings and the fact that it was

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the sought after position in this company persuades me that it is not a substantially equivalent position to offer a former service employee a field roofing job. I shall order that the company restore Dixon to his former position or a substantially equivalent position and that it make him whole for any loss of wages he may have suffered and that it post an appropriate notice addressing the unfair labor practices that I find have been committed by this company.

It has been a pleasure being in Chicago, Illinois and this trial is closed.

(Whereupon the above matter was concluded.)